United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4169

CFTC No. 75-2

JUN 30 1976

APPEAL OF OPINION AND ORDER IMPOSING REMEDIAL SANCTIONS BY CFTC COMMISSIONERS BAGLEY, RAINBOLT, AND MARTIN

I am appealing the Opinion and Order Imposing Remedial sanctions of CFTC Commissioners Bagley, Rainbolt, and Martin. My previous appeal of the Decision of Judge Liebert was partly based upon the fact that he had not objectively analyzed and evaluated the evidence. Commissioner Seevers correctly perceived the possibility of bias in Judge Lieberts Decision. And he also had the courage to say so -- clearly and distinctly, but alone. The other three Commissioners participating in the Opinion* apparently sought to defend the findings of Judge Liebert, whatever they were, and to support their own Division of Enforcement, regardless of the facts. They did not perform the function of Appeal Judges, formulating an independent decision of their own, as Commissioner Seevers did. This Appeal contends that the Opinion and Order of Commissioners Bagley, Rainbolt, and Martin contain the same bias so clearly evident in Judge Lieberts Decision.

II

In support of my contention of lack of objectivity by Judge Liebert, I cited, among other things, a number of obvious factual errors in his Decision. Each error taken by itself and considered in isolation, or out of context, may be construed to seem "harmless", if that is what one is predisposed to find. But in their totality and in their proper context, they constitute strong evidence of bias. And they are not "harmless". Commissioners Bagley, Rainbolt, and Martin have not considered the significance of the pattern of errors and half truths in Judge Lieberts' Decision. Additionally, they have not only failed to correct some of Judge Lieberts obvious factual errors, but also have added a few new

* Commissioner Dunn apparently refused to participate in this Opinion and Order. I can understand why.

errors and half truths of their own, which fall into the same biased pattern as those of Judge Liebert.

I continue to maintain that the pattern of errors and half truths of Judge Liebert and now those of Comissioners Bagley, Rainbolt, and Martin, when considered in proper context, and in their totality, constitute strong evidence of lack of objectivity. It is quite significant with respect to the handeling of this case that Commissioner s Bagley, Rainbolt, and Martin have felt unable to impose sanctions without resorting to distortions of fact, tortured reasoning, and half truths.

A few examples follow:

a. "On March 27, 1972, the date on which the respondent made the initial purchases for Millet's account ... Margin on that date was $1,000 per soybean contract." (page 2 lines 16-18)

The subject of margin requirements were discussed at great length in my Suggested Findings of Fact (pages 15 through 22) which Judge Liebert ignored. They were again discussed in my Appeal of Judge Lieberts Decision (pages 11 through 16) which Comissioners Bagley, Rainbolt, and Martin ignored.

Here we go once again. Soybean margin requirements on March 27, 1972 were $750 per contract. They subsequently were raised to $1,000 per contract, <u>after</u> the initial purchases of <u>five</u> contracts for Millet's account. The evidence is overwhelming on this point. I can not conceive of any valid excuse for such a flagrent obvious error after such a lengthy detailed discussion. This must surely, at this late stage of the proceeding, be a deliberate overt attempt to inject further confusion into the matter. This error can not be unintentional or the result of stupidity. It has to have been calculated and deliberate. And it is not "harmless".

Commissioners Bagley, Rainbolt, and Martin intended this erroneous assertion to refute the point established in my Suggested Findings of Fact that margin requirements were raised after the initial purchase of soybeans for Millet's account. The only possible way they could accomplish this was to deliberately make an appropriate false assertion, while brazenly ignoring actual facts, accepted exhibits, and truthful testimony . One must wonder at this point what is the purpose of testimony and exhibits in the first place if individuals, acting in the capacity of Appeal Judges, will not use them when they happen to conflict with their pre-determined opinions.

Margin requirements are not difficult to determine. One does not have to be a CFTC Commissioner to find what they were. Anybody can just look them up. And all necessary documents for this are part of the evidence and exhibits. The real difficulty of Commissioners Bagley, Martin, and Rainbolt is in being objective -- in being able to see what is really there. Comissioners Bagley, Rainbolt, and Martin have not made an error. They have taken liberties, deliberately and with malice, with the cold, clear facts. They have tampered with the truth in a biased, prejudiced unobjective manner. This is not carelessness. It is nothing less than a carefully conceived and executed distortion of facts.

b. Comissioners Bagley, Rainbolt, and Martin found that Judge Liebert made a "harmless" error when he found as a fact that margin requirements "changed" in June 1972. Actually that is not what Judge Liebert found in the first place. The Judge stated that margin requirements "did in fact go down" in June 1972. And he said this despite overwhelming evidence to the contrary. The exhibits show conclusively that margin requirements went up subsequent to the initial purchase of soybeans. Judge Liebert used this erroneous finding of fact to falsely imply that lower margin

requirements resulted in an improved margin-equity relationship in Millet's account. He intended to refute the point established in my Suggested Findings of Fact that Millet's account was undermargined and that a defensive trading strategy was manditory in order to maintain the soybean position, as Millet wished. This was no "harmless" error. It constitutes a flagrent misuse of judicial authority.

Comissioners Bagley, Rainbolt, and Martin just as flagrently misused their power as Appeal Judges in an attempt to cover up for Judge Liebert. They substituted their own work "changed" for the Judges words "did in fact go down", analyzed the biaselly rephrased statement completely out of context, asserted it was a "harmless" error and buried it in a footnote. Biased rephrasing, half truth techniques, and analyzing statements out of context by Appeal Judges is contrary to the entire judicial process in the United States.

This was no "harmless" error. It is a deliberate, calculated, distortion of fact, and it fits into the overall pattern of "errors" --a pattern of bias and lack of objectivity.

I believe this single incident alone constituts sufficient grounds for revoking the Opinion and Order of Comissioners Bagley, Rainbolt, and Martin.

c. "The Administrative Law Judge found that the respondent initially purchased five such contracts for Millet's account. [3]

" Although the respondent testified that he initially purchased five soybean contracts for Millet's account, the statement of account, dated April 18, 1972, indicates that on March 27, 1972, only two contracts in 'November Beans' were purchased for Millet's account." (page 2, lines 20-22 and note 3)

Commissioners Bagley, Rainbolt, and Martin apparently are unable to read a statement of account. The initial purchase of soybeans on March 27, 1972 was five contracts. They are shown on the last statement in the Exhibit of P&S statements when they were liquidated in October 1972.

If Commissioners Bagley, Rainbolt, and Martin really can produce any document substantiating their statement, it is a fraudulent document, and its origion and the manner it was put into the evidence should be investigated. The Division of Enforcement may have tampered with the evidence by injecting such a fraudulent document in order to induce the three Comissioners to write an Opinion to their liking. This may be a reason why theyhave failed to provide me with a copy of the Exhibits.

I believe that CFTC officials and Commissioners acting as Appeal Judges do not have the right, even under their Administrative Law, to introduce fraudulent statements of account showing a smaller number of contracts purchased on March 17, 1972 than actually purchased. This is not a proper way to refute my contention that Millet's account was under margined. I realize, however, that it is the only way that they can hope to refute this point established in my Suggested Findings of Fact.

A new dimension of confusion, error, biased distortion has now been introduced into the matter by the three Comissioners. And this has been done when there is already a list far too long to be the result of accident or carelesness. I believe this has been done deliberately and maliciously. And it has been done by officials of the United States Government acting in the capacity of Appeal Judges under Administrative Law.

d. In my Appeal of Judge Lieberts' decision I chalanged the accuracy of the following statement of the Judge:

> "The evidence discloses that in actual practice Respondent made trades or stated a belief that a certain trade would be profitable, and wrote a report to Millet of what he had done or intended to do, and mailed this to Mrs. Fastments address."

Commissioners Bagley, Rainbolt, and Martin found no error in this finding of fact by Judge Liebert. They assert that my claim of error "was not supported by the record and found it to be without merit"(page 4,line 4)-

There must be two records in this proceeding, the one presented at the Hearing and the one that Comissioners Bagley, Rainbolt, and Martin used as the basis for their finding.

It is almost painful to be forced to point out that Judge Liebert was clearely refering to a "report" that I had "written" in which I stated "what I had done or intended to do". And that I, personally, mailed this written report to Mrs. Fastments address. If the Commissioners are in posession of such a written report, why has it not been entered into the record? It should be one of the Exhibits.

What tortured reasoning, distortion of facts, exaggeration of imanigation did Comissioners Bagley, Rainbolt, and Martin conjur up to find that Judge Lieberts statement was not in error. Their lack of objectivity on this point can not possibly be defended.

Judge Liebert clearely attempted to imply, with characteristic bias, that I had gone through all the trouble of personally writing a lengthy explanatory report and then deliberately sending it to an address where I knew that Millet could not receive it. There can be little doubt of the implications of Judge Liebert's statement. No one can assert that this statement by the Judge was "harmless".

It is almost beyond belief that Commissioners Bagley, Rainbolt, and Martin simply asserted, without any explanation, that Judge Liebert's statement was correct, since there is no substantiating evidence in the record. The Commissioners had to be fully aware that they were brazenly denying the undenyable in a biased, unobjective manner. The Commissioners have certainly been less than objective in this finding. They have acted unconscionably and have flagrently misused their power as Appeal Judges.

I believe that this alone constitutes sufficient grounds for dismissing the Opinion and Order of the Commissioners.

Commissioners Bagley, Rainbolt, and Martin asserted they "found no evidence of bias"on the part of Judge Liebert and that his errors were "harmless". They then went of to add a few errors of their own, which fall into the same biased pattern as Judge Liebert's. They examined Judge Lieberts errors independently, out of context, rephrased them biasely to suit the purposes of the prosecution. They analyzed "harmfull" errors in such a manner as to make them seem "harmless". When examined as a totality, in proper context, without biased rephrasing, an overall pattern of lack of objectivity is evidenced.

The three Commissioners attempted to cover up for Judge Liebert's lack of objectivity and to support their own Division of Enforcement, and in the process generated the same lack of objectivity as in the origional Decision. An objective analysis of all the errors, including their pattern and implications, of Judge Liebert as well as those of the Comissioners,reveals unmistskable evidence of bias and unobjectivity. I continue to maintain that the adjudication in this proceeding has been biased and lacking in objectivity.

It is neither fair nor in keeping with the United States legal system that I have been forced to spend countless hours refuting mis-statements of fact, half truths, distortions, analysis out of context, biased re-phrasing, etc. by Judges and Commissioners acting as Appeal Judges under Administrative law. It is particularly regretfull that there is good reason to believe that this has been a deliberate tactic used by the CFTC in administering its Administrative Law. These were not "harmless" errors, nor the result of carelessness. Nor can they be attributed to stupidity. They constitute a tactic of litigation under Administrative Law -- carefully conceived and deliberately executed -- a devise of legal vendetta employed by an agency of the United States government. I believe that the CFTC has flagrently misused its powers under Administrative Law in a biased manner in the knowledge that I

could not afford an attorney. They have exploited my lack of legal council.

I believe that the manner and tactics used by the CFTC, under the guise of Administrative Law, alone constitutes grounds for dimsissing the Opinion and Order of the Commissioners.

III

I have continuously maintained that Millet perjured himself at the Hearing. The CFTC has just as continuously refused to investigate this perjury. They have evidenced no interest whatever in securing truthful evidence and testimony. Doubtless this is because their witness was the perjurer and any reflection on his credibility would destroy their case against me. They have simply asserted there is no evidence of perjury, and, at the same time, refused to accept any such evidence into the record.

Comissioner Bagley refused to re-open the Hearing without explanation. If such a hearing were to have been held, I believe that I could have demonstrated that Millet perjured himself on two occasions, and that on one of those occasions he conspired with CFTC officials. Actually, I believe that CFTC officials deliberately and knowingly solicited perjurous testimoney from Millet with respect to his trading program, in an attempt to strengthen their case against me.

Once again I call upon Comissioner Bagley to re-open the Hearing and accept evidence of perjury by Millet and of misconduct by CFTC officials into the record. Refusal to accept such testimony or evidence into the record is just one more aspect of the biased and prejudiced conduct of this proceeding.

I believe that this is the heart of the difference between Commissioner Seevers, on the one hand, and Comissioners Bagley, Rainbolt, and Martin on the other. Comissioner Seevers saw the need to hold a new Hearing. The other three were opposed because they feared evidence of

perjury by Millet and of misconduct by some of their officials would be adduced. This is also the reason why Comissioner Bagley refused to re-open the Hearing without explanation.

IV

Millet's testimoney is crucial to the CFTC's case. His statements were the basis of the origional complaint. Judge Liebert and Commissioners Bagley, Rainbolt, and Martin have attributed greater credence to Millets testimony than to mine. This Appeal and my previous Appeal has demonstrated a marked lack of objectivity in the judgement of these men. There is ample reason to believe that their lack of objectivity also extends to their evaluation of the credence attributable to Millet's testimony.

I have just demonstrated that Judges and Commissioners who make "harmless" errors are also likely to make "harmfull" errors as well. The list of errors in Judge Liebert's Decision and the Commissioners Opinion strongly suggests they are susceptible to making errors of all kinds -- even biased errors. Their judgement with respect to the veracity of Millet's testimony is just another of these errors.

I demonstrated in my Suggested Findings of Fact (nos. 1, 6, 7, 14, 15, and page 75) that over and above outright perjury there were a number of instances where Millet's testimony was wholly or partly lacking in credibility -- it was either contradicted by facts in the record, inaccurate, and misleading. As far as I am aware, the CFTC officials have never disputed these contentions. Despite this, Judge Liebert concluded "on the basis of the evidence we place more credence on the testimony of Millet". He did not elaborate.

There is more than enough evidence to cast serious doubt on the veracity of Millet's testimony as well as on the objectivity of Judge Liebert and Commissioners Bagley, Rainbolt, and Martin in evaluating Millet's testimony. Certainly there is more than enough evidence to

justify holding a new hearing to adduce clarifying testimony from Millet.

V

During the hearing, I was promised several times by Mr. Bader, the prosecuting attorney, that I would be sent a copy of all the Exhibits. In this manner he tricked me into returning to him the copy of Exhibits 1 - 8 given me at the Hearing. I was never sent a copy of any of the Exhibits 1-8 as promised. This fact was called to the attention of the CFTC and Judge Liebert in writing.* All mention of this fact was ignored. I also called this to the attention of Mr. Prince, a CFTC official, when I visited the NY Office of the CFTC. Mr. Prince merely shrugged his sholders, smiled, and walked away. I am still without a copy of Exhibits 1-8.

I believe that the CFTC Division of Enforcement has misused their prosecution powers under Administrative Law. They have unfairly made my defense as difficult as possible, knowing that I could not afford an attorney. I can not believe that there is any legal justification for their crude calous action, and that Administrative Law gives the administrators such unfairly powerful authority. I believe that the refusal of the CFTC to supply me with copies of Exhibits 1-8 is but one more example of the unfair biased conduct of this proceeding.

I believe that this alone constitutes sufficient grounds for revoking the Opinion and Order of the Commission.

VI

The Appeal of the Decision of Judge Liebert called attention to the fact that after the conclusion of the Hearing Judge Liebert engaged in

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* This was mentioned in my series of letters requesting an extension of time to complete my Suggested Findings of Fact and in my cover letter to my Suggested Findings of Fact addressed to Judge Liebert.

a long extended friendly conversation with Mr Millet and Mrs. Eastwent, lasting some 30 to 40 minutes. They discussed a long-time mutual friend, a Mr. K.C.Lee. All expressed great admiration and love for their mutual friend, which I am sure was justly deserved. They reminised in considerable detail and at great length about their old mutual friendships with Mr. Lee, recounting incident after incident extending over several decades and continents.

I demonstrated a distinct bias and lack of objectivity on the part of Judge Liebert in my Appeal of his Decision. I do not know if this mutual friendship motivated the Judge in this respect, even subconsciously. I do believe, however, as does Commissioner Seevers, that Commissioners Bagley, Rainbolt, and Martin made a grave legal blunder in not explicitly recognizing the possibility of bias and ordering a new Hearing under a different Judge. Their failure to order a new Hearing is further evidence of bias on their part.

As a result, I believe that to the extent this mutual friendship influenced Judge Liebert's objectivity, it has also become a part of the lack of objectivity of the three Commissioners. In their attempt to cover up for Judge Liebert, Comissioners Bagley, Rainbolt, and Martin have assumed an element of the Judges' bias.

VII

The Opinion of Commissioners Bagley, Rainbolt, and Martin contains the following statement:

> "The Administrative Law Judge found that after the initial purchase of soybean contracts, the respondent had engaged in some 208 additional transactions involving 690 contracts which, besides soybeans, included soybean oil, soybean meal, wheat, cotton, and potatoes. The Administrative Law Judge also found that Millet had not vested the respondent with the discretionary authority to make the trades in question."
> (page 3, last six lines)

On the following page in their Opinion the three Commissioners assert they are going to address themselves to:

"...weather there is substantial evidence in the record to support the findings of fact and conclusions of the Administrative Law Judge that the respondent willfully violated Section 4b of the Act as charged..." (page 4, lines 5-8) (emphasis added)

In this connection Commissioners Bagley, Rainbolt, and Martin went on to conclude in a subsequent passage:

" A review of Millet's testimony indicates that he intended the respondent to have limited discretion with regard to the purchase of futures contracts in soybeans. However, he specifically testified that soybeans were the only contracts in which the respondent was authorized to trade." (page 5, lines 17-20) (emphasis added)

" After the initial purchase of soybean contracts on March 27, 1972, the respondent made an additional 208 trades in Millet's account which, while to a large extent in soybeans, also included soybean oil, soybean meal, wheat, cotton, and popatoes. It is clear that those transactions in commodities other than soybeans were not authorized by Millet, and were not within the respondent's scope of discretion." (page 6, lines 6-11) (emphasis added)

It is quite clear from the foregoing that Commissioners Bagley, Rainbolt, and Martin have reversed the major finding of Judge Leibert. They have found that only trades in commodities "other than soybeans" were unauthorized.

As a result of this new finding, the number of transactions found to be unauthorized are reduced from 208 to some 19, a reduction of 91%. The number of contracts found to be unauthorized are reduced from 609 to 42, a reduction of 93%. The Commissioners determined that Judge Liebert had erred to the extent of 189 transactions involving 648 contracts. In the same Opinion the same Commissions brazenly assert that the same Judge was objective, free of bias, and made only two harmless errors.

Additionally, the Commissioners failed to recognize that as a further result of their new finding there are other findings in Judge Liebert's Decision that are no longer valid. Consider the following:

"One ancillary and obvious fact is worthy of note and it is that Respondents unauthorized trades greatly increased his commissions from what he would have received..." (Decision, page 7)

This is no longer an ancillary and obvious fact. Nor is is worthy of note.

If Commissioners Bagley, Rainbolt, and Martin had written an objective and unbiased Opinion, they would have explicitly recognized the extent that their findings deviated from that of Judge Liebert, and cited some of the statistics mentioned above. In addition, they would have explicitly taken exception to certain ancillary findings in the Judge's Decision that were no longer valid. They chose to cover up these facts.

Moreover, Commissioners Bagley, Rainbolt, and Martin continued as if they had upheld Judge Liebert's findings in full, ignoring the implications of their own finding with respect to unauthorized trading. In their first statement of their conclusions they omitted the words "as charged".

"Consequently, we find that the weight of the evidence in the record supports the Administrative Law Judge's conclusion that the respondent willfully engaged in unauthorized trades in violation of Section 4b of the Act" (page 7, lines4-7)

A few pages later, in their discussion of severity of sanctions they again restated this conclusion neatly slipping in the words "as charged".

" we affirm the findings and conclusions of the Administrative Law Judge that the respondent willfully violated Section 4b of the Act as charged" (page 10, lines 13-15) (emphasis added)

The origional complaint charged that every trade in Millets account after April 18, 1972 was unauthorized. Someone spent a good deal of time counting them. They counted all trades, every trade, not just a few, or most, or several, or only those in commoditios other than soybeans, but each and every trade was counted. The origional complaint alleged that I had absolutely no discretionary authority at all --none.

This is exactly what Judge Liebert found in his Decision -- every and all trades unauthorized -- absolutely no discretion whatever.

Commissioners Bagley, Rainbolt, and Martin, we have seen, found something quite different. They found that I did have discretion to trade soybeans and that only trades in commodities other than soybeans were unauthorized. This finding is substantially different than the charges in the origional complaint and substantially different than the finding of Judge Liebert. The three Commissioners did not find me in violation of the Act "as Charged" in some 98% of the contracts origionally alleged in violation of the Act. They did not uphold the findings of Judge Liebert in full nor the origional complaint "as charged".

Yet they went on to say that they did, slipping in the words "as charged" in their second statement of conclusions some three pages after their first statement. This action of Commissioners Bagley, Rainbolt, and Martin is unconscionable, if not outright fraudulent. Their qualification to serve as Appeal Judges is certainly open to question.

VIII

Commissioners Bagley, Rainbolt, and Martin have evaluated my Appeal from a defensive standpoint, not from impartiality. Their apparent primary objective was to cover up the bias and lack of objectivity of Judge Liebert and to support their own Division of Enforcement. They did this ruthlessly, regardless of facts and their own findings. Where desireable they just changed the facts, quoted non-existant statements of account and reports, biasly rephrasing Judge Liebert's statements and then analyzing them out of context. Commissioners Bagley, Rainbolt, and Martin did not perform the function of Appeal Judge. They acted on behalf of the prosecution.

I believe that Commissioners Bagley, Rainbolt, and Martin did not do their own homework. The prosecution did it for them.

The dissent of Commissioner Seevers stands in sharp contrast. He stands alone in a sincere personal effort for fairness and equity. He must have spent many hours analyzing the evidence, studying the testimony, evaluating the motivation of Judge Liebert, and resisting pressures from the Division of Enforcement. Commissioner Seevers recongized that a new hearing was appropriate. He should be commended for his efforts and is surely worthy of the responsibilities of his office.

In the United States I believe that legal decisions should be written by impartial Judges and not by the prosecution, even in Administrative Law under the CFTC Act. And that those acting as Judges and Appeal Judges should really act in that capacity, rather than as another representative of the prosecution, crudely attempting to cover up for the ineptness of a preceding Judge. This is not what an Appeal Judge should do.

IX

Commissioners Bagley, Rainbolt, and Martin also considered "weather the sanctions imposed by the Administrative Law Judge were excessive on the facts of this case". (page 4) They found that Judge Lieberts five year suspension was excessive and reduced it to 1½ years, calling it "remedial". A suspension of this length is as punative as Judge Leibert's was preposterous. The pattern of bias so clearely evident in Judge Lieberts Decision and the preceeding sections of the Commissioners Opinion, continues without abatement with the imposition of sanctions.

Commissioners Bagley, Rainbolt, and Martin assert that when imposing sanctions they take into account the particular circumstances

of each individual case, considering and evaluating the effect of an order suspending or prohibiting trading for a specified period of time on each particular individual respondent. They reason:

> "A short suspension imposed on a futures commission merchant may well have a more substantial impact than a much longer suspension would have on the occasional speculator. Where a firm's or individual's sole income is derived from trading in the futures markets, an Order revoking trading privileges for even a short period of time, in most cases, would have a significantly greater economic effect on the person sanctioned than it does on the occasional speculator." (page 9, lines 9-18)

I would like to review the particular circumstances of my case in the light of this assertion, with a view to evaluating the extent, if any, that the three Commissioners have really considered the facts of this particular case and the effect of the sanctions on my own personal situation.

My sole income over the past ten or more years has been from trading commodity futures. The fact that this proceeding has been in progress has prevented me from finding employment in the commodity industry since September 1974. My only income since that date has been unemployment benefits, which have expired some time ago. Economic conditions in the New York City area, together with the fact that I am 51 years old has made it impossible for me to find employment in another line of work. In other words, I have been de facto suspended without any earned income since September 1974 -- some 21 months. Commissioners Bagley, Rainbolt, and Martin want me to be without income for an additional 18 months for "remedial" purposes.

An eighteen month suspension is a very long suspension. The CFTC has frequently suspended individuals for two weeks to three months. The Commissioners have implied that my suspension should be a very long one because that is what should be given "occasional speculators", rather than a short suspension usually given to individuals whose sole

income is derived from trading commodities. The Commissioners have not examined the facts of this particular case very carefully or objectively in this respect.

Additionally, the Commissioners assert that in imposing sanctions they consider:

a. "...if the violator has consistently flaunted the Act or the Commission's rules and regulations..." (page 9 and 10)

I have been in the commodity futures industry for many, many years, both as a broker and speculator, and this has been the only complaint against me for violation of any rule or regulation. It occurred in 1972, some four years ago.

b. "...if the violation for which the sanction to be imposed is particularly egregious..." (page 9 last two lines)

"In any case, the severity of the sanction should bear some correlation to the gravity of the violation committed." (page 9, lines 19-21)

I continue to deny that any violation occurred in the first palce, and I continue to maintain that Millet gave me authority to trade his account as I did. In any event, the three Commissioners found that on the basis of Millet's testimony some 93% of the contracts origionally alleged to have been in violation of the Act were actually not in violation at all. This certainly constitutes a substantial reduction in the "gravity" and the egregiousness of the alleged violations in the origional complaint. The Commissioners are quite clear that this was not a consideration in reducing the suspension from five to 1½ years. The severity of the sanction was not correlated with the egregiousness of the violation as determined by the Commissioners in a preceeding section of their Opinion. It is quite apparent that Commissioners Bagley, Rainbolt, and Martin have not applied their own criteria in imposing sanctions.

c. "A Commission Order suspending or prohibiting tracing privileges generally should be long enough to serve as a deterrent to future violations by the respondent, and <u>also discourage similar actions by other potential violators.</u>" (page 9, lines 21-24)(emphasis added)

I believe that the last part of this statement is the full and complete reason for the imposition of sanctions for as long as 1½ years. I believe that the three Commissioners are using this case as an example or precident for future cases against other individuals. I further believe that the Commissioners have an obligation, acting as Appeal Judges , to find a fair and equitable solution to <u>this</u> case, this particular case, and this case only -- not to treat this case as a vehicle for setting precidents for other cases arising in the future against other individuals. This consideration conflicts with their assertion that they consider the particular circumstances of each case individually and the effect of sanctions on each individual respondent. They can not have it both ways at the same time -- their criteria for the imposition of sanctions are in conflict. I believe that this has been an important contributing factor to the unfairness and bias in the imposition of sanctions.

I believe that contrary to their bold assertions Commissioners Bagley, Rainbolt, and Martin have failed to consider the particular circumstances of this particular case in the imposition of sanctions. Contrary to their assertions, they were more interested in setting an example for future cases against other individuals rather than evaluating the particular circumstances and the effect of sanctions in this individual case.

My Appeal of Judge Liebert's Decision was filed in September 1975. Commissioners Bagley, Rainbolt, and Martin took some eight months to finally rule upon it. It hardly needs mention that their Opinion does not reflect eight months of thought. I do not understand what took so long. The delay may have been a deliberate delaying tactic extending

the pre-suspension period as long as possible, with the knowledge that such a delay constitutes de facto suspension. Or it may have simply taken that long for the Division of Enforcement to convince three of the five Commissioners to go along with their wishes. During this period, I could not possibly find employment in the commodity industry. This de facto suspension was a particular circumstance of this individual case, and, in accordance with their own standards, the three Commissioners should have taken it into consideration with respect to the imposition of sanctions. They did not.

The primary interest of the CFTC has been to impose the longest suspension they could get away with, for use as a precedent for future cases against other individuals. The USDA attorney, Mr Bader, origionally recommended the five year suspension to Judge Liebert, which the Judge blindly imposed. The CFTC Division of Enforcement strongly defended this five year suspension against my Appeal. Despite this, the three Commissioners reduced the suspension period to 1½ years, using an irrelevant, tortured line of reasoning having nothing to do with the unique circumstances of this particular case. They did not consider that they found some 98% of the contracts origionally alleged to be unauthorized to actually be not unauthorized. They did not consider the de facto suspension resulting from their inept handeling and delays. Nor did they consider the particular circumstances of my personal situation. Yet they asserted that they did. Commissioners Bagley, Rainbolt, and Martin were not deciding this case on the basis of its unique characteristics as they asserted. They were forging weapons for the Division of Enforcement to use in future cases against other individuals. I do not think that this a proper function of Appeal Judges.

X

CONCLUSION

Commissioners Bagley, Rainbolt, and Martin assert they found no bias in Judge Liebert's Decision, only two "harmless" errors. They addressed themselves to two issues: (1) weather there is substantial evidence to support the finding of unauthorized trades "as charged". and (2) weather sanctions imposed were excessive. They found that most of the trades origionally charged as unauthorized were really not unauthorized, and then ingored the implications of this finding. They reduced the suspension period from five to 1½ years on grounds other than finding that most of the alleged unauthorized trades were not really unauthorized and on grounds other than the unique circumstances of this particular case. This action of the three Commissioners constitutes de facto recognition of a biased Judge and at the same time reveals their own similar bias.

Commissioners Bagley, Rainbolt, and Martin should have faced the issue of bias on the part of Judge Liebert head on, as did Commissioner Seevers, and ordered a new hearing under a different judge. Instead they crudely glossed over the issue of bias, denying its existance, while at the same time removing a part of the bias in the imposition of sanctions so that it would not look quite so bad. They apparently hoped I would drop the matter and it would disappear. They were wrong.

I believe that the entire proceeding has been conducted unfairly, and constitutes a flagrent mususe of judicial authority under the protection of Administrative Law. Commissioners Bagley, Rainbolt, and Martin did not perform the function of Appeal Judges.

Commissioner Seevers clearely perceived enough possibility of bias to warrant holding a new hearing. He wrote in part "...there are a number of matters which make it difficult to conclude that the

Administrative Law Judge's findings are supported by the weight of evidence." ... "A review of the Administrative Law Judge's findings and conclusions reveals at best a carelessly written decision..." Commissioner Seevers further states that he would "remand the case to another Administrative Law Judge for a new Hearing as to remove any doubt of impartiality of bias against the respondent..."

The Opinion and Order of Commissioners Bagley, Rainbolt, and Martin should be revoked and all charges should be dropped for ever. Failing this, an entirely new hearing should be ordered, under a different Administrative Law Judge, and the subjects of perjury by Millet and of misconduct by CFTC officials in soliciting Millet's perjurous testimony should be deemed proper and pertinent subjects of any new hearing.

With respect to the use of this case as one upon which future cases against other individuals may be evaluated, I believe that it is of urgent importance that the CFTC be disciplined for the manner in which they conducted this case so that future cases against others will be handeled without bias, unfair tactics, half truths, analysis out of context, distortion of facts, tortured reasoning, etc. The CFTC Division of enforcement has breached the highest standards on conduct in administering its Administrative Law. The handeling of this case should serve as a horible example of how cases should <u>not</u> be handeled, of how Administrative Law should not be administered. Hopefully future cases against other individuals may be handeled in a fair, equitable, unbiased, and proper manner.